No. 15935

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee,

vs.

ARTHUR F. SMALLFIELD,

Appellant.

APPELLEE'S BRIEF.

THOMAS P. MENZIES,
JAMES O. WHITE, JR.,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellee.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 15935

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee,

vs.

ARTHUR F. SMALLFIELD,

Appellant.

APPELLEE'S BRIEF.

Jurisdiction.

In compliance with Rule 20 (U. S. C. A. 9, Subsec. 2b) appellant states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 2201: DECLARATORY JUDGMENTS: CREATION OF REMEDY.

> "In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking

such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1332: DISTRICT COURTS; JURISDICTION: DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States; * * *."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1291: COURTS OF APPEALS: FINAL DECISIONS OF DISTRICT COURTS.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

The necessary diversity of citizenship arose from the fact that the plaintiff is a citizen of New York and the defendant is a citizen of California. The amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs of suit [R. p. 5].

Statement of the Case.

This cause has been before the United States Court of Appeals for the Ninth Circuit previously on defendant's prior appeal from judgment in favor of plaintiff. We refer to the decision of this Honorable Court reported

in 244 F. 2d 337, at page 341, in which decision this court stated:

> "The judgment is vacated and the case remanded to the district court with directions to make findings based only on the properly admitted evidence."

The remand to the district court was based upon this court's holding that the lower court had buttressed its finding that appellant was not worthy of belief in part on inadmissibility of evidence. This court stated, however:

> "Here there is evidence in the record which was properly received which adequately supports the finding that appellant was not worthy of belief. The difficulty is that this finding was buttressed by the trial court's express reliance on evidence which was not admissible." (244 F. 2d 337, at p. 341.)

On December 30, 1957 argument was presented to the district court but none of the parties requested that further evidence be heard. The district court then rendered new Findings of Fact and Conclusions of Law and based thereon, a judgment in favor of plaintiff and appellee, the Home Insurance Company, and against defendant and appellant, Smallfield. Included in the court's findings is the following:

> "And the Court, in compliance with the directions and opinion of the United States District Court of Appeals, Ninth Circuit, having considered only the following evidence, to-wit:
>
> "1) The testimony and demeanor of defendant Arthur F. Smallfield and inconsistent statements made by said Arthur F. Smallfield concerning the

manner in which he acquired the jewelry which said Arthur F. Smallfield claimed had been stolen;

"2) The testimony of defendant's mother, Ruth Mary Lipschultz, and documentary evidence impeaching portions of her testimony, and inconsistencies between her testimony and that of the defendant Arthur F. Smallfield;

"3) Testimony of the following witnesses tending to contradict defendant's testimony as to the acquisition of the jewelry covered by the policy of insurance: Irving Lipschultz, George W. Clark, Arthur Louis Smallfield, Alice Smallfield.

"4) The prior conviction of defendant Arthur F. Smallfield." [Find. of Fact and Conclusions of Law, p. 2, line 19, through p. 3, line 1.]

In summary, the court found that neither Smallfield nor his mother had an insurable interest in the items of jewelry upon which claim was made at the time the policy was issued or at the time when defendant claimed the items were stolen; that defendant filed a false and dishonest claim; that the items which defendant claimed were stolen had not been stolen; that the defendant and his mother violated the terms and conditions of the policy concerning the making of false representations and false swearing, done with the attempt to defraud the insurance company thus voiding the policy; that the defendant's affidavits presented in motion for summary judgment were presented in bad faith.

In the Judgment rendered by the district court the trial court specifically stated:

> "* * * and the court having, in compliance with the directions of the United States Court of Appeals, Ninth Circuit, removed from its consideration all of that evidence which said United States Court of Appeals stated to be inadmissible (Smallfield vs. Home Insurance Company of New York, 244 F. 2d 337), and having made and based its findings of fact and conclusions of law solely upon that evidence which said United States Circuit Court of Appeals has stated was properly considered, and the court being fully advised in the premises and good cause appearing therefor: * * *".

Summary of Argument.

Point 1: The trial court's findings and judgment are in harmony with the prior decision of this Honorable United States Court of Appeals for the Ninth Circuit.

Point 2: The trial court's findings and judgment are supported by the record.

ARGUMENT.

POINT I.

The Trial Court's Findings and Judgment Are in Harmony With the Prior Decision of This Honorable United States Court of Appeals for the Ninth Circuit.

The attack now made by appellant on the district court's findings and judgment completely ignores this court's prior decision wherein it is held that

> "* * * there is evidence in the record which was properly received which adequately supports the finding that appellant was not worthy of belief." (244 F. 2d 337, 341.)

In footnote No. 10 in the same decision this court has listed such evidence as follows:

> "*E.g.*, appellant's prior conviction, his inconsistent statements at the trial, and of course, his demeanor which the trial court could properly have considered for this purpose. 3 Wigmore, Evidence Sec. 946."

Since the points mentioned in the quoted footnote have previously been ruled upon by this court and outlined in previous briefs filed by appellee, we shall not burden this brief with a further recital of the evidence supporting the findings. In this respect this appellate court stated:

> "While the trial court could have made the same finding on the evidence which was properly admitted, it did not do so, and we cannot say that it would have done so." (244 F. 2d 337, 341.)

POINT II.

The Trial Court's Findings and Judgment Are Supported by the Record.

Appellant's argument that based on possession alone the appellant had an insurable interest is bottomed on the unstated premise that the court was required to believe that the appellant was actually in possession of the jewelry at the time of the alleged theft. The court did not so find and appellant's brief is in error in stating that such a finding was made. The record will substantiate the court's lack of confidence in the testimony of the appellant in this and other respects. (See appellee's prior brief filed November 16, 1956, pages 7 through 21, inclusive.) California Insurance Code, Section 286, provides, in part, as follows:

> "An interest in property insured must exist when the insurance takes effect, and when the loss occurs * * *".

As found by the trial court, appellant made false statements which voided the policy. The insurance policy provides:

> "This entire policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

In the case of *C.I.T. Corporation v. American Central Ins. Co.,* 18 Cal. App. 2d 673, 64 P. 2d 742, the court sets

forth the California rule on the effect of a false statement under oath made by the insured as follows:

> "The defendant's sworn statement was, therefore, false, and its effect was to avoid the policy irrespective of its materiality. 'A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.' (Civ. Code, Sec. 2611; Victoria S.S. Co. v. Western Assurance Co., 167 Cal. 348, 139 P. 807. We have seen that the policy here considered provided that a false statement under oath, whether before or after a loss, would avoid it." (P. 745.)

See also:

O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688;

Boyer v. United States Fidelity & Guaranty Co., 206 Cal. 273, 274 Pac. 56; and

Atlas Assur. Co. v. Hurst, 11 F. 2d 250.

(All of which cases are cited in Appellee's Brief filed with this court on November 16, 1956, at pages 23 and 24).

The trial court's award of attorneys' fees was proper and modest. An award of $1,500.00 was made although the appellee had requested the sum of $2,925.00 supported with a detailed itemization of the work done, which was cut almost in half by the trial court in the exercise of its discretion. The award comes squarely within Rule 56(g) of the Federal Rules of Civil Procedure providing for such an award where affidavits "are presented in

bad faith". The award was based upon the fact that the appellant did act in bad faith in that he was knowingly untruthful in the presentation of his affidavit. The fact that the same evidence was later used at trial does not remove the fact that it was the filing of appellant's affidavits which caused appellee to incur the expense of obtaining affidavits and depositions to counter the false and fraudulent affidavit presented by appellant.

The trial court's findings that there had been no theft is thoroughly supported by the evidence and irrespective of any other considerations in the case if the jewelry which is the subject of the action was not stolen the insured would have no right of recovery against the insurance company. The court found as a fact that the jewelry was not stolen and that both the insured and his mother were guilty of fraud and false swearing in claiming that it had been stolen. This court has previously held that the lower court properly received evidence adequately supporting the finding that appellant was not worthy of belief.

In *Gale v. General Casualty Co. of America,* 120 F. 2d 925 (C. C. A. Cal.), the court states:

> "Appellants contend that the court's finding of misrepresentation and concealment is not sustained by the evidence. On this issue appellants must show the court's findings are 'clearly erroneous', due regard being 'given the opportunity of the trial court to judge of the credibility of the witnesses . . .' ".

A trier of fact may reject all of a witness' testimony if it is believed that the witness has wilfully and corruptly

sworn falsely to any material fact, and the testimony of one who has been found unreliable in one issue may properly be given little weight on other issues. (See *Liberty Mut. Ins. Co. v. Thompson,* 171 F. 2d 723, 726; *N.L.R.B. v. Pittsburgh S.S. Co.,* 337 U. S. 656, 69 S. Ct. 1283, 93 L. Ed. 1602.) The rule is codified in the California Code of Civil Procedure, Section 2061(3), as follows:

> "That a witness false in one part of his testimony is to be distrusted in others."

Conclusion.

Appellee respectfully submits that the issues in this case have previously been passed upon by this court, that the trial court followed the directions of this honorable court and that the judgment should, therefore, be sustained.

Respectfully submitted,

Thomas P. Menzies,

James O. White, Jr.,

Attorneys for Appellee.